

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NANCY J. COOK and U.S. POSTAL SERVICE,
POST OFFICE, Toledo, OH

*Docket No. 99-426; Submitted on the Record;
Issued September 25, 2000*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits on the grounds that she refused an offer of suitable work.

On May 25, 1988 appellant, a distribution clerk, filed a claim alleging that she injured her back in the performance of duty. The Office accepted appellant's claim for back strain, right shoulder strain, L5 disc protrusion with foraminal encroachment, herniated disc L4-5 and resulting surgery.

In this case, appellant's attending physician, Dr. Arthur D. Steffee, a Board-certified orthopedic surgeon, opined on June 15, 1995 that statistically appellant was unlikely to return to work. He stated that her spinal fusion was completely solid and that she was pain free for one week following the removal of the hardware from her spine. Dr. Steffee noted that three weeks postoperatively appellant began to complain of pain in the sciatic nerve distribution and that he had no explanation for her pain. Dr. Steffee stated that x-rays demonstrated degenerative disc disease at C6-7.

Dr. Steffee responded to the Office's questions by stating that appellant would probably never return to work, but that she could perform work which did not require prolonged sitting, standing, lifting, walking or "prolonged anything." He concluded, "I personally would find a great deal of difficulty in determining any significant degree of disability other than the fact that I do n[o]t think [appellant] will ever be able to find gainful employment having been off work for all of these years and having multiple back operations." Dr. Steffee referred appellant to Dr. Dan Shamir, a physician Board-certified in physical medicine and rehabilitation, for a schedule award determination. In this report, Dr. Steffee indicated that he believed that appellant was capable of performing light duty and provided work restrictions. He stated that her only disability was due to length of time that she had been unemployed.

On September 19, 1995 Dr. Steffee responded to an Office inquiry and stated that appellant should be considered permanently and totally disabled. He relied on the findings of his June 15, 1995 note. Dr. Steffee did not provide any medical reasons for his conclusion that appellant was totally disabled. He did not explain why he no longer felt that she was capable of performing the work activities mentioned in his June 15, 1995 note.

In a report dated December 20, 1995, Dr. Shamir noted appellant's history of injury and performed a physical examination. He found that appellant had limited range of motion in her spine and impairment of sensation in the left lower extremity. Dr. Shamir stated that appellant could function currently in the light work range, lifting 20 pounds occasionally and 10 pounds frequently, with occasional bending, stooping, crouching and crawling. He stated, "She could walk, sit and stand for 6 hours in an 8-hour workday, given breaks every 45 minutes, with changes in position, etc." Dr. Shamir indicated that appellant was capable of light-duty work.

The Office referred appellant for a second opinion evaluation with Dr. Richard B. Peoples, a Board-certified orthopedic, on December 5, 1995. In a report dated January 5, 1996, Dr. Peoples noted appellant's history of injury, reviewed the medical reports and performed a physical examination. He diagnosed cervical spondylosis unrelated to the June 25, 1988 employment injury. Dr. Peoples stated that appellant did not require further medical treatment and provided work restrictions. He indicated that appellant should limit kneeling, standing, bending, twisting, reaching and lifting and provided a lifting limit of 10 pounds. Dr. Peoples indicated that appellant was capable of light-duty work with the above restrictions.

The employing establishment offered appellant a light-duty position as a modified distribution clerk on March 12, 1996. The duties of the position were to sort mail of varying sizes while sitting or standing. The position included the ability to change position as needed for comfort. The specific physical requirements were sitting or standing as needed for comfort, limited bending, stooping and twisting, grasping handfuls of mail to process, reaching above the shoulder and lifting no more than 10 pounds. The employing establishment indicated that appellant should return to duty for four hours for four weeks, then five hours for four weeks and then the permanent position of six hours a day. This position complied with the work restrictions provided by Dr. Steffee in his June 15, 1995 note as well as those provided by Dr. Peoples. The 10-pound lifting limitation was less than that suggested by Dr. Steffee's referral physician, Dr. Shamir.

Appellant refused this offer on March 22, 1996 stating that she and her physician believed that the limited-duty position would aggravate her condition. Dr. Steffee completed a note on March 21, 1996 and stated that appellant continued to experience chronic low back pain. He also noted that appellant had cervical spine disc degeneration. Dr. Steffee concluded that it was unlikely that appellant would be able to perform any type of gainful employment requiring repetitive motion, lifting even 10 pounds, sitting for prolonged periods of time or standing for prolonged periods of time. He noted that appellant had not worked since 1988. Dr. Steffee did not offer any explanation of why he no longer believed that appellant was capable of work which did not require prolonged sitting, standing, lifting, walking or "prolonged anything."

Appellant informed the Office of her reasons for refusal on March 25, 1996 relying on Dr. Steffee's conclusions. The Office informed appellant on April 3, 1996 that the employing

establishment had provided her with a suitable light-duty job offer and allowed her 30 days to accept the position or offer her reasons for refusal.

Appellant refused the job offer and submitted additional medical evidence. In a report dated April 1, 1996, Dr. March C. Nadaud, an osteopath, stated that due to severe spinal condition and degenerative changes associated that appellant was unable to work for any extended or any temporary period of time. He stated that appellant had frequent exacerbation of pain and was unable to sustain any level of sitting, reaching, pulling or standing with a maximum time frame of one hour. Dr. Nadaud stated that it was unlikely that appellant would be able to do any lifting from floor to table and that working from table height, she would require frequent times of repositioning. This report does not address the specific job requirements of the position offered to appellant. The job description stated that appellant would be able to change positions at will, not requiring that she either sit or stand for more than one hour at a time within her initial four-hour workday. The position does not require that appellant lift from the floor and as previously mentioned did not limit appellant's repositioning from sitting to standing or *vice versa*.

In a letter dated May 6, 1996, the Office informed appellant that the medical evidence was not sufficient and allowed her 15 days to accept the position.

Appellant again refused the job on May 20, 1996. Appellant submitted a report from Dr. Robert A. Muehleisen, a clinical psychologist, dated May 2, 1996. He stated that appellant continued to present with symptoms of dysthymia related to her back pain and job insecurity. Dr. Muehleisen stated that appellant had considerable anxiety about returning to work as well as pain. He stated that she remained depressed and anxious and "in my opinion, unable to perform her former position of employment." This report does not address appellant's ability to perform the duties of the offered position, but rather whether she was capable of returning to her date-of-injury position.

By decision dated May 31, 1996, the Office terminated appellant's compensation benefits for the refusal to accept a suitable work position.

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits as she refused an offer of suitable work.

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.¹ As the Office in this case terminated appellant's compensation under 5 U.S.C. § 8106(c), the Office must establish that appellant refused an offer of suitable work. Section 8106(c) of the Federal Employees' Compensation Act² provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation. Section 10.124(c) of the applicable regulations³ provides that an employee who refuses or

¹ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

² 5 U.S.C. § 8106(c)(2).

³ 20 C.F.R. § 10.124(c).

neglects to work after suitable work has been offered or secure for the employee, has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation. To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.⁴

In this case, the medical evidence, consisting of Dr. Steffee's June 15, 1995 note, the December 20, 1995 report from Dr. Shamir and the January 15, 1996 report from Dr. Peoples, the Office second opinion physician, support that appellant was capable of performing light-duty work with a lifting requirement of 10 pounds and limitations on sitting, standing, bending, stooping and kneeling. The limited-duty position offered by the employing establishment complied with these restrictions.

The medical evidence to the contrary consists of Dr. Steffee's March 21, 1996 note indicating that appellant could not sit or stand for prolonged periods and could not lift 10 pounds. Dr. Steffee did not provide any new physical findings in support of his change of opinion regarding appellant's ability to perform light duty. He did not explain why he felt that appellant's offered position required prolonged standing or sitting given the caveat that appellant could change positions at will. Furthermore, Dr. Steffee did not offer any reason why he believed that appellant was unable to lift up to 10 pounds.

Dr. Nadaud also disagreed with appellant's work restrictions and stated that she was unable to sustain any level of sitting, reaching, pulling or standing with a maximum time frame of one hour. He stated that it was unlikely that appellant would be able to do any lifting whatsoever from floor to table and that working from table height, she would require frequent times of repositioning. Dr. Nadaud failed to explain how the specific light-duty position offer conflicted with the restrictions he provided appellant. The position included the ability to change position as needed for comfort, limited bending, stooping and twisting, grasping handfuls of mail to process, reaching above the shoulder and lifting no more than 10 pounds.

As the weight of the rationalized medical opinion evidence establishes that appellant was capable of performing the offered position, the Office met its burden of proof to terminate appellant's compensation benefits finding that she failed to accept suitable work.

Appellant requested an oral hearing on June 6, 1996. Appellant submitted a report dated May 15, 1997 from Dr. Nadaud. He stated that appellant experienced constant and severe pain from her low back, which had created an instability throughout the dorsal and cervical spine with chronic myofascial strain pattern. Dr. Nadaud stated that appellant experienced frequent headaches and radicular pain. He stated that appellant was unable to rise from a squat, unable to heel/toe walk and unable to bend at the hips. Dr. Nadaud concluded that appellant was totally disabled as she was unable to sit, stand, bend, stoop, lift or "create any ability to work due to her industrial injury of 1988." This report is not sufficient to establish that appellant was incapable of performing the light-duty position at the time of the Office's decision in May 1996. He did

⁴ *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

not specifically address when appellant developed the additional condition, which prevented her from sitting or standing for any period of time. As this report is not specific regarding the time frame of the development of the instability of appellant's cervical and dorsal spines, a new condition not previously addressed by appellant's physicians, the report does not establish that appellant was totally disabled at the time of the Office's termination decision and does not create a conflict with the medical evidence in the record at the time the Office made its decision.

Appellant also submitted a report dated June 10, 1997 from Dr. Robert S. Biscup, an osteopath, who noted appellant's medical history and stated, "I do not feel that this lady will be able to get back to gainful employment and her condition at this point is permanent and she should be awarded a permanent and total disability." This report does not address the specifics of appellant's condition and whether this condition was sufficient to prevent appellant from performing the duties of the offered position. He did not explain how or why he believed that appellant was unable to return to work.

By decision dated August 18, 1997, the hearing representative affirmed the Office's May 31, 1996 decision. Appellant appealed this decision to the Board, but later determined that she wished reconsideration before the Office. The Board issued an Order Dismissing Appeal on June 10, 1998. Appellant requested reconsideration before the Office and by decision dated August 7, 1998, the Office denied modification of its prior decisions.

In support of her reconsideration request, appellant submitted a report dated November 3, 1997 from Dr. Nadaud. This report is substantially similar to the May 15, 1997 report submitted before the hearing representative and suffers from the same defects. Appellant submitted a report dated December 30, 1997 from Dr. Gregory E. Forgac, a clinical psychologist. In this report, Dr. Forgac diagnosed depression and anxiety which he attributed to appellant's 1988 employment injury. He stated that appellant was unable to work at that time due to her conditions. This report does not provide any medical reasoning for this conclusion that appellant cannot work. Furthermore, Dr. Forgac did not address whether appellant was unable to perform the duties of the offered position at the time of the Office's termination decision. Therefore, this report is not sufficient to establish that the Office improperly terminated appellant's compensation benefits for the failure to accept suitable work.

On May 15, 1998 Dr. Nadaud submitted appellant's testing results. The May 5, 1998 magnetic resonance imaging of the lumbar spine revealed extensive postoperative changes, but no suggestion of central or forminal spinal stenosis despite considerable postoperative scarring. The report indicated that there was no suggestion of recurrent herniated disc. Appellant's electromyogram on April 2, 1998 demonstrated moderate chronic L5 and S1 radiculopathy on the right and mild similar changes on the left. The physician stated, "The nerve conduction studies are within the limits of normal." These tests do not contain the necessary rationalized medical opinion evidence to establish that appellant was incapable of performing the duties of her suitable work position on May 31, 1996 when the Office terminated her compensation benefits.

The August 7, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
September 25, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member